SEPARATE OPINION OF JUDGE LAING

INTRODUCTION

1. I agree with the Agent for Japan that this is an "historic proceeding". Three outstanding global citizens are before this Tribunal in a case involving regional cooperation in which significant natural and economic resources are involved. The case presents the issue of how scientific uncertainty[1] can be handled in a judicial context. It involves questions relating to the interpretation of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its interaction with cognate conventions. Above all, in this case the Tribunal makes decisions of fundamental importance to the institution of provisional measures and potentially of critical relevance to an aspect of international environmental law.

2. This Separate Opinion is offered in an effort to elucidate my views on these last two aspects of the Tribunal's Order.

PROVISIONAL MEASURES

Irreparability

3. In its Order in the *M/V "Saiga" (No. 2)* case (provisional measures) the Tribunal prescribed provisional measures without specifying any particular standard or criterion for its orders. In this Order the Tribunal has gone a step further by reciting, without more, language of article 290, paragraph 1, that is emphasized in the following quotation:

> [T]he court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances *to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment* ... . (emphasis added)

It is thereby clear to me that the Tribunal has not chosen to base its decision on the criterion of "irreparability", which is an established aspect of the jurisprudence of some other institutions. I believe that that "grave standard" is inapt for application in the wide and varied range of cases that, pursuant to UNCLOS, are likely to come before this Tribunal. In my view, this confirms what I regard as the Tribunal's position that irreparablity is not the sole required criterion. This is

[1] In this case, eminent scientists have expressed diametrically opposed opinions on several critical issues relating to the Applicants' assertion on and scientific reports that the stock of Southern Bluefin Tuna is under serious threat. *Inter alia,* these have been on: predictions of the future level of parental biomass; changes in size composition; projections on the level of recovery; the appropriate approaches to necessary scientific investigation; the rate of recruitment of young fish to the stock; the increase in mortality rates of juvenile fish; whether an Experimental Fishing Programme (EFP) can or should be conducted unilaterally; the nature and scope of an appropriate EFP; the impact of fishing by non-parties to a fisheries management Convention; the actual structure and impact of EFPs designed by Japan (critiques about hypotheses; testing modalities; number of on-board monitors; whether additional catch of 2,000 fish per annum would be very significant if combined with the Total Allowable Catch; if the stock effectively decreases after the survey and general quota reductions occur, whether it may be impossible to prove that these were not provoked by the survey; method of data review and analysis; access to data by non-survey States; independence of reviewers; constraints on vessel location). Miscellaneous documents annexed to Response.

consistent with the practice on similar forms of remedy in a substantial number of national legal systems.

4. This view on irreparability might be inferred from the plain meaning of the text of paragraph 1 of article 290. Instead of irreparability, the key to UNCLOS provisional measures is the discretionary element of appropriateness, the concept used in the key paragraph of the recitals in the Order following the analysis of the issues and the law. Along with appropriateness, the formula of preservation of the respective rights of the parties underscores the discretionary nature of provisional measures. In this Tribunal, discretion will undoubtedly be prudently exercised in the light of the purpose of provisional measures: the preservation of the *status quo pendente lite* and the maintenance of peace and good order.

5. Prudence can be guided by reasonable *a priori* criteria, based on common experience. One set which has been suggested is:

> (1) the wrong has already occurred or cannot be compensated or monetarily repaired ... (2) the certainty that the feared consequence will occur unless the Tribunal intervenes, (3) the seriousness of the threat, (4) the right being preserved has unique or particularly special value or (5) the magnitude of the underlying global public order value, e.g. such possibly *jus cogens* values as global peace and security or environmental protection.[2]

In fact, the other formula in article 290, paragaph 1, "prevent serious harm to the marine environment", which partially coincides with items (3) and (5) of the foregoing list, seems to confirm the stated view on the absence of inevitability of an irreparability test. Further confirmation is afforded by the fact that, in several contexts, the Convention gives cognition to harm or damage only when it is, e.g., "serious", "significant", "substantial" or "major", not "irreparable".

Urgency

6. The Tribunal has reaffirmed that in cases where an autonomous arbitral tribunal is being constituted, provisional measures under article 290, paragraph 5, may be prescribed only when the "urgency of the situation so requires". The Tribunal is then authorized to prescribe such measures as evidently cannot await the *establishment* of the arbitral tribunal to handle the merits of the dispute. However, in this Order, the measures have been prescribed pending a *decision* of the arbitral tribunal. In my view, this really means that the measures are valid up to the moment prior to that tribunal's first relevant decision after establishment.

7. This requirement of "procedural urgency" is designed to restrict this Tribunal from unnecessarily assuming superior authority in matters relating to provisional measures over the tribunal dealing with the merits (*United Nations Convention on the Law of the Sea 1982: A Commentary* (hereafter "Virginia Commentary"), Vol. V (Shabtai Rosenne and Louis B. Sohn, eds., 1989), p. 56). I believe that one or two of the measures that the Tribunal has prescribed in this case come rather close to the province of the arbitral tribunal. This is a matter about which this Tribunal will have to continue to use the utmost circumspection.

---

[2] See *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998,* Separate Opinion of Judge Laing, paragraph 25.

8. I agree with counsel for Australia that urgency or imminence is of the activity causing the harm, not necessarily the harm itself. Hence the present availability of stock is not determinative if, as a result of utilization, it is likely to disappear in the future. However, I disagree that there is a formal criterion of substantive urgency either under paragraph 5 or paragraph 1 (which omits any reference to urgency). Of course, in my view, urgency is a factor that the Tribunal will very often take into consideration in weighing the question of appropriateness. However, equally or alternatively, the Tribunal will often weigh such circumstances as the five suggested criteria for ordering provisional measures that I listed earlier.[3]

Rights of the Parties

9. In my view, the rights of the parties need not be of a particular hierarchical order or restricted class. The Applicants have identified a series of rights for protection. They may be all said to relate to the obligations contained in articles 64 and 116 to 119 of the Convention. These articles are cited in the Order but only in relation to the Respondent's unilateral implementation of an experimental fishing programme. I am convinced that the Order also covers additional rights. At the same time, the texts of these various provisions of the Order underscore that it adopts an approach to provisional measures unadorned by the trappings of irreparability.

Convenience of all Parties

10. A factor generally understood to militate against the prescription of provisional measures is the convenience of all parties. That factor will at times induce the Tribunal not to order any or to reformulate the measures requested. This is what the Tribunal has done in this case. Thus, it has not ordered the premature termination of the Respondent's current EFP, as requested. The Respondent had argued that interruption would impair the Programme's scientific validity and diminish the value of data collected to date.

11. On the other hand, the Tribunal has not declined to order provisional measures because of the possibly negative impact on the stock of increased fishing by non-parties to the 1993 Convention for the Conservation of Southern Bluefin Tuna (hereafter "the 1993 Convention"). Nevertheless, the Order does recite the problem with increasing fishing by non-parties and prescribes that the three litigants "should" make further efforts to reach agreement with non-parties. The aim is salutary, but it is unclear what benefit will accrue from prescribing such dialogue, especially where the obligation is not couched in patently mandatory terms. Possibly the motivation and justification are based on policies which transcend provisional measures *per se*.

[3] It will be noted that there is no requirement of urgency under article 31 of the Agreement for the Implementation of the Provisions of the 1995 United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereafter "Straddling Fish Stocks Agreement"). Article 31, paragraph 2, provides for provisional measures in terms identical to the first formula of UNCLOS article 290, paragraph 1, and also "to prevent damage to the stocks in question".

PRECAUTIONARY APPROACH

12. One such possible set of policies relates to special devices designed for the protection of the environment. The Applicants based their Requests for provisional measures on articles 64, 116–119 and 300 of UNCLOS; the 1993 Convention, the parties' practice thereunder, "as well as their obligations under general international law, in particular the precautionary principle" which, according to the Statement of Claim in the arbitral proceedings, annexed to the Request for provisional measures, "must direct any party in the application of those articles". They argued that the principle

> must be applied by States in taking decisions about actions which entail threats of serious or irreversible damage to the environment, where there is scientific uncertainty about the effect of such actions. The principle requires caution and vigilance in decision-making in the face of such uncertainty.

13. The Tribunal's Order does not refer to the "precautionary principle". Instead, in the recitals it chronicles the opposing views of the Applicants and Respondent about the condition of the stock in view of the allegations about the impact thereon of utilization. It also recites that "the parties should in the circumstances act with 'prudence and caution' to ensure that effective conservation measures are taken to prevent serious harm to the stock". It further notes the scientific disagreement about appropriate measures to conserve the stock and the non-agreement of the parties about whether the measures actually taken have led to improvement. This aspect of the recitals states the Tribunal's conclusion about the need for article 290-type of measures despite the Tribunal's inability conclusively to assess the scientific evidence. In my view, these statements are pregnant with meaning. In order to clarify and critique what I understand that the Tribunal has stated, I must first explore the background of the so-called precautionary principle of international environmental relations and law.

Background on Environmental Precaution

14. The notion of environmental precaution largely stems from diplomatic practice and treaty-making in the spheres, originally, of international marine pollution and, now, of biodiversity, climate change, pollution generally and, broadly, the environment. Its main thesis is that, in the face of serious risk to or grounds (as appropriately qualified) for concern about the environment, scientific uncertainty or the absence of complete proof should not stand in the way of positive action to minimize risks or take actions of a conservatory, preventative or curative nature. In addition to scientific uncertainty, the most frequently articulated conditions or circumstances are concerns of an intergenerational nature and forensic or proof difficulties, generally in the context of rapid change and perceived high risks. The thrust of the notion is vesting a broad dispensation to policy makers, seeking to provide guidance to administrative and other decision-makers and shifting the burden of proof to the State in control of the territory from which the harm might emanate or to the responsible actor. The notion has been rapidly adopted in most recent instruments and policy documents on the protection and preservation of the environment.[4]

[4] Of note is para. 17.21 of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development. Paragraph 17.1 also calls for "new approaches to the marine and coastal area management and development, at the national, regional and global levels, approaches that are integrated in context and are precautionary and anticipatory

15. Even as questioning of the acceptability of the precautionary notion diminishes, challenges increase regarding such specifics as: the wide potential ambit of its coverage; the clarity of operational criteria; the monetary costs of environmental regulation; possible public health risks associated with the very remedies improvised to avoid risk; diversity and vagueness of articulations of the notion; uncertainties about attendant obligations, and the imprecision and subjectivity of such a value-laden notion.[5] Nevertheless, the notion has been "broadly accepted for international action, even if the consequence of its application in a given situation remains open to interpretation" (A. D'Amato and K. Engel, *International Environmental Law Anthology* (1996), p. 22).

16. However, it is not possible, on the basis of the materials available and arguments presented on this application for provisional measures, to determine whether, as the Applicants contend, customary international law recognizes a precautionary principle.[6]

Precaution in Marine Living Resource Management

17. However, it cannot be denied that UNCLOS adopts a precautionary *approach.* This may be gleaned, *inter alia,* from preambular paragraph 4, identifying as an aspect of the "legal order for the seas and oceans" "the conservation of their living resources ...". Several provisions in Part V of the Convention, e.g. articles 63-66, on conservation and utilization of a number of species in the exclusive economic zone, identify conservation as a crucial value. So do article 61, specifically dealing with conservation in general, and article 64, dealing with conservation and optimum utilization of highly migratory species (such as tuna). Article 116, on the right to fish on the high seas, *inter alia* reiterates the conservation obligation on nationals of non-coastal/distant fishing States while fishing in the exclusive economic zone of other States. Article 117 explicitly articulates the duty of all States "to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for" conservation of living resources in the high seas. Article 118 requires inter-State cooperation in the conservation and management of high seas living resources. Such cooperation is to extend to negotiations leading to the establishment of subregional or regional fisheries organizations. And article 119, entitled "conservation of the living

---

in ambit ...". Paragraph 15 of the Rio Declaration, adopted at the same Conference, provides that "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." See generally *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, Separate Opinion by Judge Weeramantry, *I.C.J. Reports 1995*, pp. 288, 341-344; *The Precautionary Principle and International Law: The Challenge of Implementatrion* (D. Freestone and E. Hey, eds., 1996); D. Freestone and E. Hey in Freestone and Hey 1996, pp. 19-28, 258; A. Kiss in Freestone and Hey 1996, pp. 3-16, 258; *The Global Environment: Institutions, Law and Policy;* (K. Vig and R. Axlerod, eds., 1999)*;* A. D'Amato and K. Engel, *International Environmental Law Anthology* (1996); J. Cameron and J. Abouchar, in Freestone and Hey 1996, pp. 29-52; C. Burton, *22 Harv. Env. L.R,.* pp. 509-558 (1998); M. Kamminga in Freestone and Hey 1996, pp. 171-186; O. McIntyre and T. Mosedale, *9 Jo. Env. L,.* pp. 221-241 (1997); W. Gullett, *14 Env. & Pl. L.J.,* pp. 52-69 (1997).

[5] P. Sands in Freestone and Hey 1996, p. 134; F. Cross, *53 Wash. & Lee L.R.,* pp. 851-925 (1996); J. Hickey and V. Walker, *14 Va. Env. L. J.,* pp. 423-454 (1995); J. Macdonald, *26 O.D.I.L.,* pp. 255-286 (1995).

[6] It might be noted that treaties and formal instruments use different language of obligation; the notion is stated variously (as a principle, approach, concept, measures, action); no authoritative judicial decision unequivocally supports the notion; doctrine is indecisive, and domestic juridical materials are uncertain or evolving.

resources of the high seas", deals with the allocation of allowable catches and "establishing other conservation measures". Although paragraph 1(a) refers to measures, based on the best scientific evidence, for production of the maximum sustainable yield, the conservatory thrust of this article is vigorously reaffirmed by the treatment, in paragraph (b), of the effects of management measures on associated or dependent species the populations of which should be maintained or restored "above levels at which their reproduction may become seriously threatened". Article 116, in association with the Part V articles mentioned above, has been stated to point to the precautionary "principle" of fisheries management, while article 119 has been said to reflect a precautionary "approach" "when scientific data is not available or is inadequate to enable comprehensive decision-making" (Virginia Commentary, Vol. IV, pp. 288, 310). Most of these are the very provisions before this Tribunal today. Strikingly, also, article 290, paragraph 1's reference to serious harm to the marine environment as a basis for provisional measures also underscores the salience of the approach.

18. I have drawn the reader's attention to several recitals in the Order that are of particular interest in the connection. The Tribunal also recites the apparent key importance in this case of serious harm to the marine environment as a crucial, perhaps *the* crucial criterion or condition for provisional measures and it prescribes as provisional measures a prohibition of experimental programmes except by agreement of all three parties and annual catch limits (quotas), which include the concept of payback for catch taken over quota in 1999. The Tribunal's apparent willingness to base an edifice of provisional measures for possible harm to marine living resources on the language of article 290 dealing with serious harm to the environment must be approached with some prudence since scientific views might differ about the underlying question. Besides, article 194, paragraph 5, of the Convention,[7] which partly deals with the matter, is not unequivocal and the precautionary approach remains very general. I therefore hold that reliance on the preservation of rights formula of article 290, paragraph 1, must continue to be the main engine of this aspect of provisional measures.

19. In view of my earlier discussion, it becomes evident that the Tribunal has adopted the precautionary approach for the purposes of provisional measures in such a case as the present. In my view, adopting an *approach*, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures.

20. My conclusions so far are bolstered by such recent precedents as paragraph 17.21 of Agenda 21. It is also reinforced by various provisions in articles 6 and 7 of the Code of Conduct for Responsible Fisheries of the Food and Agriculture Organization and articles 5(c) and 6 of the Straddling Fish Stocks Agreement, with detailed requirements for the application of the precautionary approach. In the present context, it matters little that the former is a voluntary Code and the latter is not yet in force.[8] With some cogency, these developments were judicially presaged by the International Court of Justice in 1974:

---

[7] Article 194, paragraph 5, of UNCLOS states that measures taken in accordance with Part XII, on protection and preservation of the marine environment, shall include those necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Impliedly, the ingredients of the marine environment include living resources. However it is evident that this does not dispose of the question posed in the text.

[8] These developments were foreshadowed by the 1982 resolution of the International Whaling Commission, imposing a ban on commercial whaling, and by the 1989 United Nations General Assembly resolution

> [E]ven if the Court holds that Iceland's extension of its fishery limits is not opposable to the Applicant, this does not mean that the Applicant is under no obligation to Iceland with respect to fishing in disputed waters in the 12-mile to 50-mile zone. On the contrary, both States have an obligation to take full account of each other's rights and of any fishery waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them ... (*Fisheries Jurisdiction* case, *I.C.J. Reports 1974,* pp. 3, 31, paragraph 72).

21. The Tribunal has not followed the suggestion that has been made in this case that potential damage to fish stocks should not be treated as, e.g., damage by a dam. However, in my view, while the Tribunal has drawn its conclusions and based its prescriptions in the face of scientific uncertainty, it has not, *per se*, engaged in an explicit reversal of the burden of proof. I believe that, where possible, such matters are best reserved for the stage of the merits, i.e. for the arbitral tribunal.[9] The cautiousness of the Tribunal's Order thus becomes apparent. This is commendable, since this entire area is fraught with difficulty.

CONCLUSION

22. It is ironic that these disagreements about science and natural resources should result in judicial proceedings when the Respondent consumes the overwhelming majority of the harvest of southern bluefin tuna and is therefore the ultimate financial resource. It might also appear to be regrettable that Japan has been made a party in its first international adjudication in over 90 years. However, this is not surprising, since the judicial resolution of disputes is now one of the most pervasive phenomena of contemporary international life. In fact, this is one of the most notable features of UNCLOS, which devotes three of its nine annexes to compulsory dispute resolution. It might be predicted that this trend will continue, and that devices like provisional measures and the precautionary notion will be frequently featured. It is nevertheless hoped that the parties will be able to craft an expeditious resolution of their problem.

(Signed) Edward A. Laing

---

recommending modalities for introducing a ban on fishing with driftnets. However, I am not quite certain whether these two precedents are more consistent with the pretension of establishing a more comprehensive normative framework than I believe the approach connotes.

[9] In fact, in the area of fisheries management, such a decision should be made with great care, because of its possible impact on fishermen which, *prima facie,* could be unfair and unrealistic, unless the level of scientific certainty about probable damages increases.